79384-1

No.
COA No. 55418-2-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM F. JENSEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard A. Jones

PETITION FOR REVIEW

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UNITED STATES CONSTITUTIONAL PROVISIONS

FEDERAL CASES

A. IDENTITY OF PETITIONER

William Jensen asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals unpublished decision in *State v. William F. Jensen*, No. 55418-2-I (September 25, 2006). A copy of the decision is in the Appendix at pages A-1 to A-13.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth and Fourteenth Amendments guarantee an individual a fair trial before an impartial jury. Where a prosecutor engages in misconduct which seeks a verdict based on passion and prejudice, the defendant is denied a fair trial. Is a significant issue under the Constitutions of the United States and Washington presented where the Court of Appeals termed the prosecutor's comment improper yet "isolated"?

2. A defendant has the Sixth Amendment right to counsel at all critical stages of the proceedings. Where the police intentionally circumvented the right to counsel to deliberately obtain statements from the defendant, the statements are inadmissible at a

subsequent trial. Here, while awaiting trial on domestic violence charges, the police through the use of an undercover police officer surreptitiously tape recorded Mr. Jensen's statements soliciting the murder of his wife, his sister-in-law, daughter, and son. Where the Court of Appeals found the trial court correctly ruled the statements admissible, is a significant issue under the United States and Washington Constitutions presented?

3. A defendant has a Sixth Amendment right to a jury trial and a Fourteenth Amendment right to proof beyond a reasonable doubt on every element of the charged offense. A fact which increases the sentence beyond the maximum sentence authorized by the jury verdict is an element of the offense and must be found by the jury beyond a reasonable doubt. Is a significant issue under the United States Constitution presented where the trial court violated Mr. Jensen's right to a jury trial when it imposed consecutive sentences based upon a judicial finding by a preponderance of the evidence, that the offenses constituted serious violent offenses?

4. Did the trial court violate Mr. Jensen's Fourth and Sixth Amendment rights when during trial one of the testifying police officers reviewed Mr. Jensen's trial notes to his lawyer?

5. Did the prosecutor violate Mr. Jensen's Fourteenth Amendment right to due process and a fair trial when she admitted false testimony and solicited the opinion of a testifying police officer regarding Mr. Jensen's guilt?

6. Did the trial court violate Mr. Jensen's Fifth and Sixth Amendment rights when it admitted his statements to an undercover officer regarding his pending charges on another matter after his invocation of his rights after arrest on the pending charges?

7. Did trial counsel render ineffective assistance of counsel in violation of Mr. Jensen's Sixth Amendment right?

D. STATEMENT OF THE CASE

A complete statement of the facts may be found in Amended Brief of Appellant at 3-7 and the Court of Appeals decision at 2-6 and are incorporated by reference herein.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. THE PROSECUTOR'S DISPARAGEMENT OF DEFENSE COUNSEL DURING CLOSING ARGUMENT INFRINGED MR. JENSEN'S DUE PROCESS RIGHT TO A FAIR TRIAL

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution.

In addition, because defendants have a Sixth Amendment right to the effective assistance of counsel, personally attacking defense counsel may rise to the level of constitutional error. *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir.1983)(*per curiam)*, *cert. denied sub nom, McCarthy v. Bruno*, 469 U.S. 920 (1984).

In *State v. Gonzales,* this Court reversed a conviction where the prosecutor's argument was very similar to the argument here. 111 Wn.App. 276, 283-84, 45 P.3d 205 (2002). In *Gonzales,* the prosecutor told the jury

> I have a very different job than the defense attorney . . . I have an oath and an obligation to see that justice is

> served . . . Justice, that's my responsibility and justice is holding him responsible for the crime he committed.

Id. at 283.

Although the trial court overruled the objection as "not well taken," this Court reversed the conviction, finding the prosecutor's argument to be misconduct. *Id.* at 284. Relying on the Fifth Circuit's decision in *United States v. Frascone,* 747 F.2d 953 (5th Cir. 1984),[1] the court reasoned the prosecutor's argument established in the jurors' minds "the false notion that unlike defense attorneys, prosecutor's take an oath 'to see that justice is served." *Gonzales*, 111 Wn.App. at 283-84. The Court found that "[s]uch an argument clearly has the potential to affect the verdict, which would necessitate reversal." *Id.*

While properly concluding the prosecutor's remark was improper, the Court of Appeals nevertheless construed the remark as "isolated." Decision at 6. But the Court ignored its own decision in *Gonzales* where the prosecutor's remark could be similarly construed as "isolated" yet the Court found the remark necessitated reversal. The remark here had the same potential to affect the jury

[1] In *Frascone*, the prosecutor argued "I take an oath to see that justice is done. [The defense] take an oath to represent their client zealously." *Frascone,* 747 F.2d at 957. The district court immediately sustained the defense objection to the argument and directed the jury to disregard the argument, a fact critical to the appellate court's refusal to reverse the conviction. *Id.* at 957-58.

verdict and should have resulted in the reversal of Mr. Jensen's conviction. This Court must accept review and reverse Mr. Jensen's convictions.

2. THE ADMISSION OF MR. JENSEN'S STATEMENTS TO UNDERCOVER OFFICER STEVENS VIOLATED HIS SIXTH AMENDMENT RIGHT TO COUNSEL

The right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding. U.S. Const. amend. 6; *Powell v. Alabama*, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932); *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). Once the Sixth Amendment right to counsel has attached, the State may not properly interrogate the accused in the absence of counsel unless the accused validly waives his or her constitutional right. *Brewer v. Williams*, 430 U.S. 387, 398, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977); *State v. Stewart*, 113 Wn.2d 462, 468, 780 P.2d 844 (1989).

Once a defendant's Sixth Amendment right attaches with the formal filing of charges, an undisclosed government agent may not deliberately elicit incriminating statements from the defendant. *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986); *Maine v. Moulton*, 474 U.S. 159, 176, 106 S. Ct. 477,

88 L. Ed. 2d 481 (1985); *United States v. Henry*, 447 U.S. 264, 270-72, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980); *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). An incriminating statement, whether the State obtains it by intentionally creating an opportunity for the defendant to speak to an agent without counsel present, or by the knowing exploitation of such an opportunity, may not be used against the defendant as evidence at his trial. *Moulton*, 474 U.S. at 176; *Massiah*, 377 U.S. at 206.

The police here had an undercover police officer act as an accomplice of the person hired to commit the murders in order to deliberately elicit incriminating statements from Mr. Jensen. Those statements were subsequently admitted at trial.

In *Moulton, supra,* the same scenario was presented. Mr. Moulton and his co-defendant, Mr. Colson, were arrested and subsequently indicted on four counts of theft. Out of custody on bail and awaiting trial, the two men met and discussed a plot to kill the primary State's witness against them. After the meeting, Mr. Colson went to the police, where he confessed to the theft charges. In return he was promised that no further charges would be brought regarding the murder plot if he cooperated. Colson agreed and

began a series of telephone calls with Mr. Moulton about the plot to murder the witness that were recorded by the police. Mr. Colson was also was fitted with a body wire prior to a meeting with Mr. Moulton, which the police also recorded. During this meeting, Mr. Colson prompted details about the plot from Mr. Moulton. All of these statements by Mr. Moulton were admitted at his subsequent trial. The United States Supreme Court reversed his convictions, finding his Sixth Amendment right to counsel was violated by the admission of his statements to Mr. Colson while awaiting trial on the underlying theft charges. *Moulton*, 474 U.S. at 176-77.

> Thus, the Sixth Amendment is not violated whenever -- by luck or happenstance -- the State obtains incriminating statements from the accused after the right to counsel has attached. However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Moulton, 474 U.S. at 176. The Court went on further to hold: "By concealing the fact that Colson was an agent of the State, the police denied Moulton the opportunity to consult with counsel and

thus denied him the assistance of counsel guaranteed by the Sixth Amendment." *Moulton*, 474 U.S. at 176.

Moulton is indistinguishable from Mr. Jensen's matter. Both matters began while the individual was awaiting trial and both matters involved the solicitation to murder a key witness in the underlying case. Both matters involved the use of an agent of the police to deliberately elicit incriminating statements from the defendant which were subsequently used against them at trial. Thus, as in *Moulton,* Mr. Jensen's Sixth Amendment right to counsel was infringed by the admission of the statements.

In rejecting Mr. Jensen's argument, the Court of Appeals relied upon the Supreme Court's decision in *Texas v. Cobb,* 532 U.S. 162, 164, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001) to rule the right to counsel is "offense specific." Decision at 8-10. Yet the Court of Appeals ignored that the fact the undercover police officer here was soliciting information from Mr. Jensen regarding his domestic violence issues upon which his right to counsel had already attached, thus *Cobb* has no significance. This Court should grant review, rule Mr. Jensen's Sixth Amendment right o counsel was violated, and reverse his convictions.

3. BASED UPON ITS FACTUAL FINDING, THE TRIAL COURT INCREASED THE PUNISHMENT TO WHICH MR. JENSEN WAS EXPOSED AND VIOLATED HIS RIGHT TO A JURY TRIAL AND DUE PROCESS OF LAW

The Sixth Amendment right to a jury trial and the Due Process Clause of the Fourteenth Amendment entitle a criminal defendant to a jury determination of every element of an offense with which he is charged on the basis of proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). These constitutional rights, by definition, limit the punishment to which criminal defendants are exposed. The Sixth Amendment protects criminal defendants from exposure to penalties "*exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 483 (emphasis in original). Likewise, the Due Process Clause of the Fourteenth Amendment protects criminal defendants from an increased sentence based upon facts not formally pleaded, submitted to a jury, and proven beyond a reasonable doubt. *See Specht v. Patterson*, 386 U.S. 605, 609-11, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967).

In other words, a court's ability to impose a sentence is limited to the maximum allowed by the jury verdict alone. *Blakely v.*

Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to punishment.'" *Id.* (italics in original).

The Sentencing Reform Act (SRA) presumes sentences for multiple offenses "shall be served concurrently." RCW 9.94A.589 (1)(a). Under the statute, the presumption of concurrent sentences may be overcome by a judicial finding that the offenses arose from "separate and distinct criminal conduct." Throughout the SRA, judicial findings of fact are based upon a preponderance of the evidence, and there is no requirement courts employ a different standard of proof in assessing whether conduct is separate and distinct. *See, e.g.*, RCW 9.94A.500 (instructing courts to make findings regarding prior convictions by preponderance); RCW 9.94A.530(2) (authorizing court to base exceptional sentence on facts proved by preponderance); *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004) (under SRA, State must prove existence and comparability of prior out-of-state conviction by preponderance). In those cases where the court finds "separate and distinct" conduct, it must impose consecutive sentences. RCW 9.94A.589(1)(b).

The presumptive sentence for Mr. Jensen was 180 months. CP 130, 132; RCW 9.94A.589 (1)(a). Mr. Jensen was exposed to an *additional* 540 months imprisonment based upon the implied judicial finding of fact that the offenses arose from "separate and distinct" conduct. CP 132. Once the court made any other decision other than imposing the 180 month concurrent presumptive sentence, it violated *Blakely*. *Blakely*, 542 U.S. at 302 ("The relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.") (Italics in original).

Because this finding of fact increased the sentence to which Mr. Jensen was exposed, the Sixth and Fourteenth Amendments, as conceived by the Framers, required the State to prove the fact to a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 497 (finding exposure to increased punishment based upon fact never proved to jury beyond reasonable doubt to be "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system"); *Blakely*, 542 U.S. at 313-14. This Court should accept review, overrule its previous decision in *State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005), and reverse and

remand Mr. Jensen's consecutive sentences for resentencing to concurrent sentences.

4. MR. JENSEN'S RIGHT TO BE FREE FROM UNLAWFUL SEARCHES AND SEIZURES AND HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED WHEN THE POLICE OFFICER REVIEWED HIS NOTES AT TRIAL

Mr. Jensen contends that his rights to be free from unlawful searches and seizures as well as his right to the effective and conflict-free assistance of counsel were violated when Officer Stevens reviewed his notes to his attorney that he was taking at counsel table during trial and used those notes to incriminate him. Statement of Additional Grounds at pages 1-22.

The Fourth and Fourteenth Amendments guarantee against unlawful searches and seizures by the police. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In addition, a criminal defendant has the right guaranteed by the Sixth Amendment to the effective and conflict-free representation of counsel. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Court of Appeals ruled Mr. Jensen did not object nor seek return of the documents, nor did the officer read anything Mr.

Jensen wrote or otherwise intercept any privileged communications. Decision at 11-12. Mr. Jensen seeks review of his claim.

5. THE PROSECUTOR COMMITTED MISCONDUCT IN PRESENTING FALSE TESTIMONY VIOLATING MR. JENSEN'S RIGHT TO A FAIR TRIAL

Mr. Jensen claims the prosecutor committed misconduct in presenting the testimony of Officer Stevens to the jury which deviated from her taped statement, thus violating his right to a fair trial. Statement of Additional Grounds at pages 22-34.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *DeChristoforo,* 416 U.S. at 643; *Davenport*, 100 Wn.2d at 762. Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution.

The Court of Appeals ruled the prosecutor's playing of the tape to the jury resolved any inconsistency in the officer's testimony. Decision at 12. Mr. Jensen seeks review of this issue.

6. THE PROSECUTOR'S SOLICITATION OF OFFICER STEIGER'S OPINION REGARDING MR. JENSEN'S GUILT VIOLATED HIS RIGHT TO A FAIR TRIAL

Mr. Jensen contends the prosecutor solicited the opinion of investigating police officer Steiger regarding his guilt before the jury, thus constituting prosecutorial misconduct which denied him a fair trial under the Fourteenth Amendment. Statement of Additional Grounds at pages 35-42.

Prosecutorial misconduct may deprive a defendant of a fair trial, and only a fair trial is a constitutional trial. *DeChristoforo,* 416 U.S. at 643; *Davenport*, 100 Wn.2d at 762. Prosecutorial misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution.

The Court of Appeals ruled the door was opened by Mr. Jensen's attorney on cross-examination, thus the testimony was not erroneously admitted. Decision at 12. Mr. Jensen seeks this Court's review of his issue.

7. MR. JENSEN'S FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS TO COUNSEL WERE VIOLATED WHEN HIS STATEMENTS TO THE UNDERCOVER OFFICER REGARDING HIS PENDING CHARGES WERE ADMITTED

Mr. Jensen contends he invoked his right to remain silent and his right to counsel when he was questioned after being arrested on the domestic violence charges. As a result, he contends the admission of his subsequent statements to the undercover officer were improperly admitted as they related to his domestic abuse charges wherein he had invoked his rights. Statement of Additional Grounds at pages 43-46.

A criminal defendant possesses both a Fifth Amendment right to silence and a Sixth Amendment right to counsel at the time he faces custodial interrogation. *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d (1966).

The Court of Appeals ruled the only statement made to Officer Stevens on the subject of Mr. Jensen's pending charges was to identify the charges on which he was being held, thus no violation occurred. Decision at 12. Mr. Jensen seeks review of that decision.

8 MR. JENSEN WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

Mr. Jensen contended he was denied the effective assistance of counsel where his counsel failed to investigate his competency to stand trial, failed to move to suppress his statements to the undercover officer on Sixth Amendment grounds, failed to object to numerous evidentiary rulings of the trial court, and possessed a personal conflict which contributed to counsel's overall deficient performance. Statement of Additional Grounds at pages 48-53.

A criminal defendant has the right to the effective assistance of counsel at all stages of the proceeding. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

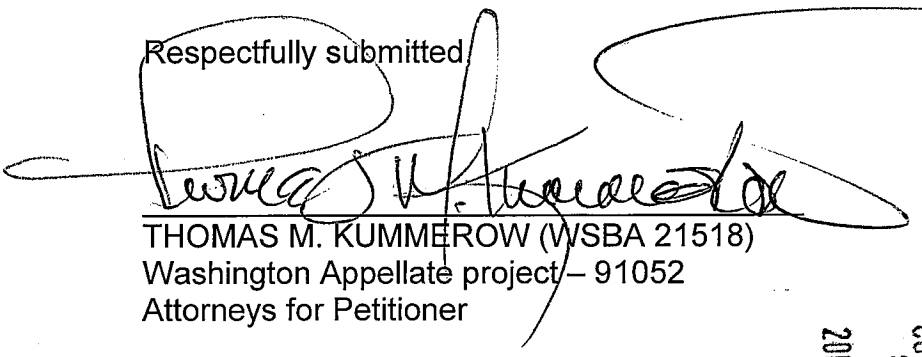
The Court of Appeals ruled counsel was not ineffective or made tactical choices. Decision at 12. Mr. Jensen seeks review of the Court's ruling.

F. CONCLUSION

For the reasons stated, Mr. Jensen submits this Court must accept review and reverse his convictions.

DATED this 25th day of October 2006.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
Washington Appellate project – 91052
Attorneys for Petitioner

Today I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

OCT 25 2006
Date

Done in Seattle, Washington

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,	)	NO. 55418-2-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
WILLIAM F. JENSEN,	)	
	)	
Appellant.	)	FILED: SEPTEMBER 25, 2006

PER CURIAM. After being jailed for threatening his wife, former King County Sheriff's Deputy William Jensen sought to hire a fellow inmate to kill her. He hoped to receive a portion of her sizeable estate. Jensen's plan eventually grew to include the murder of three other family members. A jury convicted Jensen of four counts of solicitation of first degree murder. He contends on appeal that the prosecutor's closing argument was so prejudicial he could not receive a fair trial. Because there was no substantial likelihood the misconduct affected the jury's verdicts, we affirm the conviction.

Sue and William Jensen were married in 1979. After a 1997 accident forced Jensen to leave law enforcement, his relationship with his wife suffered. Sue filed for dissolution in January 2001. At that point, the couple had a 16-year-old daughter and a 13-year-old son.

Sue had inherited over $2 million in assets from her parents. The acrimonious dissolution focused largely on Jensen's spending of what Sue believed to be her money. She had several of the couple's assets frozen. This, combined with child support payments, exerted financial pressure on Jensen.

Jensen threatened Sue's life twice in 2001, once at a deposition and once during a telephone call. These incidents led to criminal charges, and Jensen was taken into the King County jail in June 2003. A pretrial hearing was set for July 28 of that year and the trial for August 4.

Self-described "professional career criminal" Gregory Carpenter met Jensen in the King County jail. After hearing Jensen complain repeatedly about his wife, Carpenter suggested that he could help Jensen solve his problems. After much discussion, Carpenter agreed to kill Jensen's wife, her sister, and his daughter for approximately $150,000, with two $2,500 installments as front money. Jensen sent Carpenter to his sister, who unwittingly provided $2,500 in furtherance of this plan. Jensen wanted the family members dead at least by the time his trial started.

However, just over two weeks before he was scheduled to commit the murders, Carpenter decided to turn Jensen in to the authorities. He began

meeting with King County Detectives Cloyd Steiger and Sharon Stevens. Stevens decided to pose as Carpenter's crime partner, Lisa, a person Carpenter had described to Jensen as trustworthy. Jensen had never met her.

Stevens, as "Lisa," visited Jensen at the jail on July 24, 2003. She quickly gained his trust and elicited several incriminating statements from him. Stevens returned to the jail as "Lisa" a few days later. This time she recorded Jensen's incriminating statements. During this second conversation, Jensen asked her to add his son to the list of people to be killed. He believed this would help him receive his wife's estate, even if she had written a will that excluded him. Jensen offered $50,000 more for the murder of his son.

Shortly thereafter, Jensen was arrested and charged with four counts of soliciting first degree murder. At a jury trial that lasted seven court days, the State presented the above evidence through several witnesses—primarily Carpenter and Stevens. The State played the recording of the July 26 jail conversation between Jensen and Stevens. Jensen put on evidence that Carpenter was not trustworthy, although there was no evidence Carpenter received anything but the original $2,500 installment for his services.

Jensen also testified, explaining that his financial situation was not as dire as the State portrayed. He denied threatening Sue's life. He explained his actions--and his recorded incriminating statements--as a "reverse sting." That is, Jensen said he was trying to set Carpenter up for attempted murder. He thought doing so would put Carpenter in jail for life, keep his family safe, and give him

bargaining leverage on his pending charges. Jensen said he gave his family's actual information to Carpenter because he did not believe the State could have charged Carpenter with the attempted murder of fictitious people. He said he included his sister-in-law and children as targets because he hoped more convictions would help put Carpenter and his accomplices away longer. He explained that he did not believe he had enough information to go to police when he was arrested.

The jury convicted Jensen as charged, and the trial court imposed four standard range consecutive sentences totaling 720 months. Jensen appeals the convictions and the sentence.

Jensen first contends that a comment by the prosecutor in closing argument was so improper as to require reversal. The State concedes the remark was improper but responds that the remark did not affect the verdict.

Where a defendant alleges improper argument, he bears the burden of establishing impropriety and prejudicial effect, i.e., a substantial likelihood the misconduct affected the jury's verdict. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Allegedly improper arguments are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. Reversal is not required if the misconduct could have been obviated by a curative instruction the defense did not request. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). "The absence of a motion for mistrial at the time of the argument strongly suggests to a court that the

argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

The prosecutor argued in closing that Jensen's attorney had attempted to mislead the jury during voir dire:

> PROSECUTOR: Mr. Jensen is charged with the crime of Solicitation to Commit Murder in the First Degree. He's not charged with attempted murder. And he's not charged with murder. I have to go back to jury selection when I had to repeatedly object to the way that counsel was misleading you about what the law was. I objected several times. The Court sustained those objections. The good news is at this point you're now provided the law and you can see the extent to which the defense was attempting to mislead you by the series of questions --
>
> DEFENSE COUNSEL: Your Honor, that's improper argument and I object.
>
> TRIAL COURT: Sustained, counsel.
>
> PROSECUTOR: You have to ask yourself why are they attempting to mislead us --
>
> DEFENSE COUNSEL: Objection, improper.
>
> TRIAL COURT: Sustained.
>
> PROSECUTOR: —throughout this case. There's been a suggestion by the defense that there had to be a substantial step taken after the solicitation occurred. There's also been a suggestion that the person who was solicited, the person who was accepting the money had to also have the intent to carry through with the murder and there was a series of questions asked during jury selection that related to that.

After the trial court sustained the objections, Jensen's counsel did not ask for a mistrial or a curative instruction. Rather, defense counsel elected to respond to these comments by telling the jury that he had been discussing intent in jury selection and that intent was an element of solicitation:

> The prosecutor ended her remarks by telling you that I was attempting to mislead you earlier when we spoke about the State's necessity of proving intent. It wasn't a substantial step. It was intent that I referenced which are obviously one of the ones of the charts that she displayed for you because that's what they have to prove beyond any reasonable doubt.

Given this response by defense counsel, we are not persuaded the prosecutor's remarks rendered the trial unfair. The court had already instructed the jury that the arguments of counsel were not evidence. When the prosecutor made the improper remark, the court sustained both objections. The court was asked to do no more. Defense counsel was well aware of his right to request a curative instruction. The seven day trial was marked by several curative instructions, given at the request of both parties. Moreover, the State's rebuttal paid deference to the role of criminal defense counsel:

> The defense counsel reminds me of an old story about closing arguments about Clarence Darrow. Darrow was a very famous lawyer at the turn of the century. He was a famous defense attorney who took a lot of unpopular cases, unfortunately the lot of defense attorneys. They perform a valuable service in making sure that every defendant gets a fair trial.

The prosecutor then went on to argue that defense counsel had so little to work with legally and factually that he could only attack Carpenter's credibility. Later in rebuttal, the prosecutor again spoke respectfully of the role of defense counsel: "We thank you and I thank you on behalf of defense counsel too. As I alluded to, his role is an important one in this case." This record does not support the conclusion that the isolated remark rendered the trial unfair.

In trying to avoid this conclusion, Jensen relies primarily on two federal cases: U.S. v. Friedman, 909 F.2d 705 (2d Cir. 1990), and Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983). In Friedman, the prosecutor repeatedly attacked the integrity of the defense counsel. The prosecutor labeled counsel an unsworn witness for the defense, said defense counsel was willing to defend drug dealers and "try to get them off, perhaps even for high fees," and mischaracterized defense counsel's argument before telling the jury: "he will make any argument he can to get that guy off." Friedman, 909 F.2d at 708. Only some of defense counsel's objections were sustained, and his mistrial motion was denied.

In Bruno, the prosecutor insinuated without basis that defense counsel had illegally pressured a witness to change her story, implied that the fact an accused hires counsel is probative of guilt, and compared defense counsel to Judas. Both federal courts held the misconduct prejudicial. Neither case bears any resemblance to this record in which the impropriety was isolated and the court granted every requested remedy.

We reached a similar conclusion in State v. Negrete, 72 Wn. App. 62, 67, 863 P.2d 137 (1993). There, Negrete's lawyer called two State's witnesses liars in closing. The prosecutor argued in rebuttal that the lawyer was "'being paid to twist the words of the witnesses by Mr. Negrete.'" Negrete, 72 Wn. App. at 66 (emphasis omitted). Noting Friedman and Bruno, the Negrete court compared the impropriety of the remark against the fact that the judge had sustained the defense objection, the lack of a request for a mistrial or curative instruction, the

court's other instructions, the strength of the State's case, and the isolated nature of the remark. The court held the remark, though improper, did not require a new trial. That analysis yields the same conclusion here.

Jensen next contends that the trial court violated his Sixth Amendment right to counsel by admitting the statements he made to Detective Stevens when she visited him in jail, pretending to be "Lisa." The State responds that when Jensen made these statements, his Sixth Amendment right had not yet attached for the solicitation charges. Jensen concedes that when he talked with "Lisa," he had not yet been charged with solicitation, the offense for which he was convicted in the present matter. He was in custody only because of pending charges related to his earlier threats against his wife. He contends that because his right to counsel had attached with respect to these pending charges, the State was not permitted to elicit incriminating statements from him related to these charges or any other charges being investigated.

The United States Supreme Court recently confirmed that the Sixth Amendment right to counsel is "offense specific." Texas v. Cobb, 532 U.S. 162, 164, 121 S. Ct. 1335, 149 L. Ed. 2d 321 (2001). That right does not attach to an uncharged offense even if the uncharged offense is "closely related factually" to the charged offense. Cobb, 532 U.S. at 164. The right cannot be invoked until a prosecution is commenced, "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S. Ct.

2204, 115 L. Ed. 2d 158 (1991) (citations and internal quotation marks omitted). The only exception to this rule arises when the charged and uncharged offense are the same offense for double jeopardy purposes. Cobb, 532 U.S. at 173.

In Cobb, a home was burglarized and two of its residents disappeared. Cobb was indicted only for the burglary. Counsel was appointed. After gathering evidence that Cobb might have killed the missing residents, police secured a warrant for Cobb's arrest and interrogated him without counsel. Cobb's subsequent confession was admitted at the murder trial. Notwithstanding the fact that the charged and uncharged crimes were very closely related, "the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders." Cobb, 532 U.S. at 174.

Jensen does not argue his charged and uncharged offenses would be the same offense under double jeopardy analysis. He relies on Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985). Moulton limits the rule of inadmissibility to information elicited through interrogation on pending charges:

> incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

Moulton, 474 U.S. at 180 (emphasis added). Moulton, however, does not bar admission of incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, at a trial of those offenses. Because Jensen's Sixth Amendment right to counsel on the solicitation charges

had not yet attached when he made his statements to Detective Stevens, the court did not err in admitting them in the trial of the solicitation charges.

Jensen argues in reply that Detective Stevens questioned him not only about the solicitation facts, but also about the pending harassment charge for which his Sixth Amendment right to counsel had attached. He contends she had the express purpose of questioning him about the pending charges. The record does not bear out this assertion. Her only question related to the pending charge did no more than establish that he was in custody on the pending charge. This was not an incriminating statement. Therefore, we need not consider whether Moulton would call for a remedy if the interrogation had elicited an incriminating statement concerning the pending charges.

Related to this argument, Jensen has filed pro se a motion to take additional evidence under RAP 9.11 to establish that he invoked his Fifth Amendment right to remain silent when arrested on the pending charges. The motion is denied as it does not meet the criteria of the rule, notably the requirement that the additional evidence "would probably change the decision being reviewed." RAP 9.11(a)(2).

Finally, Jensen challenges the court's order that he serve his sentences consecutively. Such an order is mandatory when an offender's serious violent offenses arise from separate and distinct criminal conduct. RCW 9.94A.589(1)(b). Jensen contends a jury must decide beyond a reasonable doubt that his criminal conduct was separate and distinct, relying on Apprendi v.

New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Our Supreme Court rejected this argument in State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005). Following Cubias, we reject it here as well.

Jensen similarly contends the court failed to expressly find that his convictions arose from separate and distinct conduct. To the extent that the statute imposes such a requirement, it was met. Each count alleged a different victim. Thus, the guilty verdicts on each count show that each conviction arose from separate and distinct criminal conduct. See Cubias, 155 Wn.2d at 552–53, 556 n.4.

STATEMENT OF ADDITIONAL GROUNDS

We briefly address the numerous grounds Jensen raises pro se, concluding none has merit.

Jensen contends the trial court improperly seized notes he had taken at counsel table. The court reviewed the document in question in camera in connection with a discovery dispute, apparently retaining possession of it. Neither Jensen nor his lawyer objected nor asked for the document's return. There was no improper seizure.

Next, relying on cases involving government interception of privileged attorney-client communications, Jensen contends the State violated his right to a fair trial and effective assistance of counsel because Detective Stevens saw him taking notes from counsel table. Stevens testified she watched Jensen taking

notes and described two of the exhibits on counsel table that Jensen referred to while writing. The detective did not read anything Jensen wrote, and did not intercept any privileged information.

Jensen next contends the prosecutor committed prejudicial misconduct by failing to correct an inconsistency between Detective Stevens's testimony and the interview tape. But the tape, played to the jury during closing argument and jury deliberations, was sufficient to resolve any inconsistency.

Jensen contends the State committed misconduct by eliciting from Detective Steiger testimony about the angry comments he made to Jensen when Steiger arrested Jensen. Jensen contends these amounted to an impermissible opinion as to Jensen's guilt. But these questions were within the scope of the questions Jensen's lawyer asked the detective on direct examination.

Jensen contends the State violated his Fifth and Sixth Amendment rights by admitting his statements relating to his original criminal charges, which were still pending at the time of his solicitation trial. The only statement he made to Detective Stevens on the subject of his pending charges was to identify the charge on which he was being held. No violation occurred.

Jensen contends the court improperly denied his mistrial motion at the close of evidence. Jensen contended below that because he had been forced to walk without a wheel chair from the jail to the courtroom, he had appeared unnecessarily sweaty in front of the jury when he testified, prejudicing him. But

Jensen failed to raise this mistrial motion until after Jensen testified, depriving the court of any opportunity to remedy the situation.

Jensen contends the court should have granted his motion for a new trial, made at his sentencing hearing, on the basis that he received ineffective assistance of trial counsel. Jensen's claims were primarily based on his allegation that drugs he had been prescribed while in jail made him unable to aid in his defense. The court considered Jensen's representations concerning the effects of his prescription drug use and denied the motion. We do not review such credibility determinations.

Jensen similarly contends he received ineffective assistance from his trial counsel because trial counsel failed to raise certain Fifth and Sixth Amendment claims. We have already rejected those issues on their merits in this opinion.

Jensen finally contends his counsel was deficient for failing to object when a State's witness violated a motion in limine by testifying that Jensen's wife petitioned for a protection order during their dissolution. The decision not to object was likely strategic, and the testimony could not have affected the outcome of the trial.

Affirmed.

FOR THE COURT:

Becker, J.
Appelwick, J.
Cox, J.